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IN THE
Supreme Court of the United States

DAVID R. OLOFSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF AMICUS CURIAE OF MONTANA SHOOTING SPORTS ASSOCIATION AND VIRGINIA CITIZENS DEFENSE LEAGUE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES. iii

INTEREST OF *AMICI CURIAE*. 1

SUMMARY OF ARGUMENT. 2

ARGUMENT. 5

I. THE COURT OF APPEALS AFFIRMANCE OF OLOFSON'S CONVICTION, DESPITE THE CONFLICT WITH STAPLES, PLACES MILLIONS OF GUN OWNERS AT RISK OF BECOMING "FELONS-BY-CHANCE," IN DEROGATION OF THEIR RIGHT TO KEEP AND BEAR ARMS AND THEIR RIGHT TO DUE PROCESS, WHENEVER THEIR FIREARM HAPPENS TO MALFUNCTION AND AS A RESULT, DISCHARGES MORE THAN ONE SHOT AFTER A SINGLE PULL OF THE TRIGGER. 5

A. The Courts Below Adopted a Definition of "Automatically" at Odds With *Staples*, Sweeping in Any and All Malfunctioning Semiautomatic Firearms That Fire More Than One Round Per Trigger Pull, Even Where the Firing is Out of Control of the Shooter, or Where the Firearm Jams and Stops Firing Before the Trigger is Released or the Firearm is Empty. 5

B. All Semiautomatic Firearms Are Susceptible to a Wide Variety of Malfunctions That Can Cause More Than One Round to Fire Per Trigger Pull 8

1. Broken Disconnector. 9

2. Hammer Following Bolt. 10

3. Frozen Firing Pin 11

4. Broken Firing Pin 12

5. Fouled Bolt Face 13

6. Improper Headspace 13

7. Sensitive or Improper Primer. 14

8. Cook-Off 14

C. Semi-Auto Rifles Based on Military Designs Are More Susceptible to Malfunctions That Can Cause More Than One Round to Fire Per Trigger Pull. . . 16

1. Free Floating Firing Pins Increase the Risk of Malfunction Causing More Than One Shot to Fire With Only One Pull of the Trigger. . . . 16

2. The Use of Some M-16 Parts in Commercial Semiautomatic Rifles Increases the Risk of Malfunction Leading to More Than One Shot to Fire With Only One Pull of the Trigger. 18

D. Malfunctions that Cause More Than One Round to Fire Can Also Occur With Old Double Barrel Shotguns, Thus Making Them "Machineguns" Under the Government's Wildly Expanded Definition. 20

E. Even a Single Action Revolver Can Malfunction and Fire Two or More Rounds With Only One Trigger Pull, Thus Becoming a "Machinegun" Under the Government's Absurd Standard. 20

Conclusion. 25

TABLE OF AUTHORITIES

Page

STATUTES

26 U.S.C. § 5845(b) section 1140) . . . . . 3, *passim*

18 U.S.C. § 922(o) . . . . . 3, *passim*

18 U.S.C. § 924(2) . . . . . 3, *passim*

CASES

Staples v. United States, 511 U.S. 600 (1994) 5, 6, 7, 20, 24

MISCELLANEOUS

Wayne Faatz, "The Mysterious Slam-Fire," The American Rifleman, October 1983 . . . 10, 11, 14, 17

William T. Drake, Assistant Director, Regulatory Enforcement, BATF, warning letter to SGW/Olympic Arms, 1983 18

Stephen E. Higgins, Director of the BATF, "Open Letter to Licensees and Others Concerned" . . . 18, 19

INTEREST OF AMICI CURIAE[1]

The Montana Shooting Sports Association ("MSSA")(www.mtssa.org), is a non-profit corporation organized under the laws of the State of Montana and is an association of like-minded people. The purpose of MSSA is to "support and promote firearm safety, the shooting sports, hunting, firearm collecting, and personal protection using firearms, to provide education to its members concerning shooting, firearms, safety, hunting and the right to keep and bear arms, to own and or manage one or more shooting facilities for the use of its members and or others, to conduct such other activities as serves the needs of its members." MSSA has a genuine and viable interest in this litigation as its goals and its existence depends upon the protection of the rights and interests of its members, many of whom own semi-auto firearms and other firearms which are susceptible to the same malfunction at issue in this case.

The Virginia Citizens Defense League ("VCDL")(www.vcdl.org), is a non-profit Virginia corporation. VCDL's primary mission is to advocate for and to protect the right to keep and bear arms on behalf of its five-thousand members. A large number of VCDL's membership own semiautomatic firearms, any of which could malfunction at any time and

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[1] It is hereby certified that the parties have consented to the filing of this brief; that counsel of record for all parties waived the requirement of notice of the intention to file this *amicus curiae* brief; and that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

unexpectedly fire more than one shot per trigger pull. That being the case, VCDL has a significant interest in the litigation at hand in protecting its membership from getting into serious legal trouble due to such a malfunction.

Each of the *amici curiae* was established, *inter alia*, for education purposes related to participation in the public policy process, which purposes include programs to conduct research, and to inform and educate the public on important issues of national concern, the construction of state and federal constitutions and statutes related to the right of citizens to bear arms, and questions related to human and civil rights secured by law, including the defense of the right to own and use firearms, and related issues. In the past, each of the *amici* has conducted research on issues involving the U.S. Constitution and the constitutions of their respective states, and each has filed *amicus curiae* briefs in other federal litigation involving such issues.

It is hoped that the perspective of the *amici curiae* on the issues in the present case will be of assistance to the Court in deciding whether to grant the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

The petition concerns the important question of the meaning of "automatically," as applied to a malfunctioning semiautomatic rifle, in a prosecution

for the knowing transfer of a machinegun (as defined in 26 U.S.C. section 5845(b)) in alleged violation of 18 U.S.C. sections 922(o) and 924(2).

If, as the government contends, any firearm that simply malfunctions and fires more than one shot per trigger pull is firing "automatically" and is thus a "machinegun" then millions of firearms owners are vulnerable to having their firearm suddenly become a "machinegun" whenever they fire it, since such a malfunction can occur at any time, for many reasons.

Those reasons include, but are not limited to: defective, worn, or broken parts, improper maintenance, improper headspace, and improper or defective ammunition, among other causes as will be shown below. All semiautomatic firearms are susceptible to such malfunctions, from lowly .22 rimfire rifles, to hunting and skeet shooting shotguns, to semi-auto hunting rifles and civilian semiautomatic rifles based on a military design, such as the AR-15 in this case.

In fact, not only are all semiautomatics susceptible to such malfunctions, so are double barrel shotguns and even revolvers, including single action six-shooters based on designs dating back to the 1800's or even earlier, with malfunctions causing those types of firearms to also fire more than one shot per each trigger pull, thus transforming Grand-Dad's old double barrel or single action six-shooter into a "machinegun' under the government's definition.

Such a sweeping standard not only stretches credibility and common sense, it also puts every gun owner of other than a pump shotgun or a single shot rifle at risk of becoming an instant "felon by chance" every time they pull the trigger, because of variables largely out of the shooter's control. Such is a recipe for shocking arbitrariness and exposure to criminal prosecution, potentially snaring even the most innocent of gun owners.

And if a gun owner has a firearm that malfunctions because of wear and use, or for other reasons, there is no remedy or safe harbor. There is no way the owner may divest himself of the firearm for repair or even disposal without being susceptible to prosecution for having illegally transferred a "machine gun." Nor is there a clear mechanism for the gun owner to be sure his firearm is no longer a "machinegun" after he has cleaned, repaired, or adjusted the firearm, or changed ammo to cure the problem. If someone else reinserts the right variable, such as incorrect ammunition (or manipulation of the selector switch as in this case), the malfunction could happen again, thus triggering a prosecution for transfer of a machinegun. In addition, a possession charge is also a possibility at any point for whoever knowingly "possesses" the "machinegun." There is no guarantee that if the gun owner contacts the police or the BATF immediately upon discovery of the "machinegun" that a prosecution will not follow.

ARGUMENT

I. THE COURT OF APPEALS' AFFIRMANCE OF OLOFSON'S CONVICTION, DESPITE THE CONFLICT WITH *STAPLES*, PLACES MILLIONS OF GUN OWNERS AT RISK OF BECOMING "FELONS-BY-CHANCE," IN DEROGATION OF THEIR RIGHT TO KEEP AND BEAR ARMS AND THEIR RIGHT TO DUE PROCESS, WHENEVER THEIR FIREARM HAPPENS TO MALFUNCTION AND AS A RESULT DISCHARGES MORE THAN ONE SHOT AFTER A SINGLE PULL OF THE TRIGGER.

A. The Courts Below Adopted a Definition of "Automatically" at Odds With Staples, Sweeping in Any and All Malfunctioning Semiautomatic Firearms That Fire More Than One Round Per Trigger Pull, Even Where the Firing is Out of Control of the Shooter, or Where the Firearm Jams and Stops Firing Before the Trigger is Released or the Firearm is Empty.

In *Staples v. United States*, 511 U.S. 600, 602 n.1 (1994), this Court defined "automatically" as the firing of more than one shot with a single pull of the trigger where the shooter stops the firearm from firing by either releasing the trigger, or by consciously holding it back until the supply of ammunition in the firearm is exhausted:

> As used here, the terms "automatic" and "fully automatic" refer to a weapon that fires repeatedly with a single pull of the trigger. That is, once its trigger is depressed, the weapon will automatically continue to fire until its trigger is released or the ammunition is exhausted. Such weapons are "machineguns" within the meaning of the Act. We use the term "semi automatic" to designate a weapon that fires only one shot with each pull of the trigger, and which requires no manual manipulation by the operator to place another round in the chamber after each round is fired. [*Id.*]

Semiautomatic firearms are designed to fire only one shot per each trigger pull, whereas full-auto firearms are designed to fire more than one shot in sequence per each trigger pull, with the firearm continuing to fire until the trigger is released or until the ammunition is exhausted, as noted by this Court in *Staples*. Select-fire firearms give the user the choice of placing a selector switch in the "semi" or "full" position and thus setting the mode of possible fire as either semi-auto or as full-auto.

The above noted *Staples* definition of the terms "automatic" and "fully-automatic" reflect this Court's application of the essential mens rea requirement by contemplating only firearms that stop firing when the trigger is released, or at the choice of the shooter continue to fire because the trigger is not released, thus emptying the firearm. Such a definition would

not include firearms that malfunction and fire more than one shot because of that malfunction, with the malfunction beyond the control of the shooter, starting and stopping on its own accord, regardless of the wishes of the shooter. In this case, as the Petition notes, at 16, the evidence showed only that Olofson knew that his AR-15 could malfunction, suffering a hammer follow through, firing three or four shots at a single pull of the trigger without manual reloading and then jamming (stopping firing because of a mechanical stoppage related to the malfunction, rather than either the trigger being released or the ammunition being exhausted).

As the Petition notes, *Id.*, according to the prosecution's expansive view of "automatically," a malfunctioning rifle which jammed after shooting more than one shot at the single pull of the trigger is a machinegun, regardless of whether it stopped shooting before either the trigger was released or the ammunition was exhausted because of a malfunction. The prosecution argued at trial that, whether Olofson's AR-15 shot more than one shot at the single pull of the trigger as a result of a "hammer follow" malfunction "makes [no] difference under the statute [:] If you pull the trigger [of a firearm] once and it fires more than one round, **no matter what the cause**, it's a machine gun." Tr. 151, ll. 9-15 (emphasis added)

The court of appeals affirmed the rejection of the *Staples* standard and the use of the prosecution's greatly expanded definition, further defining "automatically" to include when a firearm shoots more

than one round per trigger pull "as the result of a self-acting mechanism."

If a malfunctioning firearm that discharges more than one round per trigger pull can be a "fully automatic" firearm, then all semiautomatic firearms (those designed to only fire one shot per trigger pull) of all types, whether originally of a military or civilian design/model, may at any time become a "fully automatic" since any number of malfunctions can cause the firing of more than one shot per trigger pull.

B. All Semiautomatic Firearms Are Susceptible to a Wide Variety of Malfunctions That Can Cause More Than One Round to Fire Per Trigger

Firearms that are designed to fire semiautomatic only are designed to fire only one shot per each function of the trigger (trigger pull). In such semiautomatic firearms, a disconnector is used to hold the hammer back after each shot, preventing the hammer from following the bolt forward as the bolt cycles, and requiring the trigger to be released and then pulled again before another round can be fired.

In contrast, firearms designed to fire full-auto are designed to fire more than one shot in sequence per each trigger pull, with the use of an auto sear, which releases the hammer once the bolt is completely in battery, but not requiring a release of the trigger, thus permitting the firearm to fire for as long as the trigger

is held to the rear without the requirement of releasing the trigger and pulling it again. If the trigger is not released before all the ammunition is expended, the shooter can empty the firearm with that one pull of the trigger. The rifle at issue in this case did not contain an auto-scar, and was designed by the manufacturer to fire only semi-auto. Select-fire firearms give the user the choice of placing a selector switch in the "semi" or "full" position and thus setting the mode of fire as semi-auto or as full-auto. Some models have a full-auto mode that allows only a certain number of rounds to be fired per trigger pull, such as the "three round burst" mode in some modern military weapons.

Even a rifle designed to fire semi-auto only can malfunction and fire more than one shot per trigger pull. This can happen to all semiauto firearms, of any design. As will be further explained below, rifles patterned after military designs are particularly susceptible to this malfunction, but even when a rifle is not a military design, it is possible. Such a malfunction can occur for a variety of reasons:

1. **Broken disconnector**. Semiautomatics (whether derived from military designs or not) have a part known as a "disconnector." This holds back the firing pin or hammer until the shooter releases the trigger, ensuring that only one shot is fired per trigger pull. But disconnectors may break, in which event a semiautomatic will begin firing more than one shot per trigger pull. This can happen to any semiautomatic firearm, including a youth's .22. This is known as a "slam

fire" or a "hammer follow through." *See* Wayne Faatz, "The Mysterious Slam-Fire," The American Rifleman, October 1983 ("American Rifleman").[2] As will be discussed below, the hardness of the primer can affect whether this happens, with a harder primer decreasing the likelihood and a softer primer increasing it. If the disconnector is broken and causes this malfunction, it is possible for the firearm to continue to fire for as long as the trigger is pulled to the rear. However it could also lead to personal injury or catastrophic failure, such as was experienced by the author of the American Rifleman article, depending on other variables of design, wear, and maintenance.

2. **Hammer following the bolt, aka "Hammer Follow Through."** As the American Rifleman put it, "this happens mostly in match rifles that have had the rear hammer hooks stoned [i.e., polished] excessively and non-symmetrically in achieving a crisp trigger pull. The sear falls, allowing the hammer to follow the bolt, firing the cartridge before the bolt is properly locked." This results in the same malfunction as the broken

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[2] Available online at:

http://www.mtssa.org/olofson/slamfire/index.html That article is distributed by commercial firearms manufacturer Springfield Armory to all of its customers who purchase its M1-A and M1-Garand semiautomatic rifles along with a warning on slam fires: http://www.mtssa.org/olofson/warning.html See also the online analysis of Fulton Armory at:

http://www.fulton-armory.com/SlamFire.htm and at: http://www.fulton-armory.com/SlamFire2.htm

disconnector. It could lead to the catastrophic failure of a sheered bolt and shattered stock discussed in the American Rifleman article, but may not, depending on the design and other variables.

This can also happen when the ammunition is weak, such as a "squib" load where the factory does not load the normal amount of powder, or where the powder has been exposed to oil, resulting in the bolt not cycling all the way back such that the hammer does not get caught on the sear, with the hammer simply going forward again, following the bolt and firing the next round.

3. **Frozen firing pin (caused by rust or debris).** When there is excessive dirt, fouling, or rust from corrosion (as occurs when using corrosive surplus ammunition) in the firing pin channel, this can cause the firing pin to stick in the forward position, causing the cartridge to fire upon being chambered. If this happens, the firearm will fire more than one shot with only one pull of the trigger (known to civilian shooters as a "string fire") and even if the shooter realizes what is happening and releases the trigger, the firearm will fire uncontrollably until empty, regardless of trigger position. Again, this can happen to any semi-auto of any design, including the youth's Ruger 10/22, Remington Model Nylon 66, or grandpa's old semi-auto hunting rifle or semi-auto shotgun such as a semi-auto Remington Model 1100. This can even happen upon merely

chambering a round, without touching the trigger, since the trigger is out of the equation.[3]

4. **Broken firing pin**. A broken firing pin that is now in two pieces can wedge forward, causing the same malfunction as a frozen firing pin, leading to more than one round being fired per trigger pull, with the most likely result being uncontrollable firing until empty even if the trigger is released. Both the frozen firing pin and broken firing pin malfunction have occurred even with semi-automatic handguns, causing the handgun to fire uncontrollably until empty even if the shooter releases the trigger. For example, this has happened to competition shooters firing Colt 1911 semi-automatic .45 handguns at Camp Perry

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[3] For example, see:

http://www.thehighroad.org/archive/index.php/t-4124.html

"I had a strange occurrence with my '43 SA Garand this weekend. I was shooting 1980 Danish Surplus (the stuff that comes in Enbloc clips). Twice, the rifle slamfired the second round in the clip (ie. Two round burst with the first pull of the trigger, the other six shot normally). The first time got my attention, but I had the sling wrapped securely around my arm and knew the rifle wasn't going anywhere, plus I figured it was probably a sensitive primer. Then about three clips later, it did it again. Also only on the second round in the clip. At that, I packed up the rifle and ammo and shot my Mosin for the duration. I took the rifle apart when I got home and found nothing apparently wrong. I pulled the firing pin expecting that maybe it was gummed up, but it was pretty clean and rattled freely in the bolt. Is there anything else I should look for? Could weak springs cause this? I have a Wolff spring kit that I plan on installing. I put about 600 rounds through the rifle before this with no problems at all. I do use grease at the proper lubrication points."

shooting matches. This can even happen upon merely chambering a round, without touching the trigger.

5. **Fouled bolt face**. Debris on the bolt face, in front of the firing pin, such as brass shavings from cartridge cases and primers, can act in the same manner as a frozen firing pin and cause the same malfunctions as discussed above, with the same result of a runaway gun emptying itself even if the shooter releases the trigger. As with the broken firing pin, this can also happen upon merely chambering a round, without touching the trigger.

6. **Improper headspace**. If the space between the bolt face and the cartridge chamber is too tight, then the forward travel of the bolt will be stopped by the base of the cartridge rather than the locking lug of the bolt, with the firing pin impacting the primer with increased force since there is an abrupt stop in less space, with the firing pin continuing forward under its own inertia. Depending on the mass of the firing pin and the sensitivity of the primer, it will result in the same malfunction as a broken firing pin, with the firearm firing uncontrollably, cycling as fast as it can, until empty. Improper headspace can be an error from the factory or can be caused by an improperly sized ammunition case, whether the ammunition is new from a factory or from an improper reload.

7. **Sensitive or improper primer**. As the 1983 American Rifleman article states, "A large pistol primer inadvertently used in a reload or a rifle primer not seated flush, could create the same situation."

8. **Cook-off.** This occurs when the barrel is hot enough, from rapid firing, to cause either the primer or the powder in a case to ignite, without even requiring the firing pin to impact the primer. In fact, if the barrel is hot enough, even if the firing pin is removed from the firearm the firearm could empty an entire magazine just from the heat alone. This is why most true machineguns fire from an open bolt, such as the BAR, the Thompson, Mac-10, the Uzi, the Sten, etc., just so they won't cook off. The M-16, the M-14, the MP-5 submachine gun, etc. are exceptions. Cook offs are possible with all closed bolt semiautomatics just as with full autos. This has happened with M1-Garands, and semi-auto M1A's, AR-15s, M1-Carbines, and many other semiautomatics. Such a string fire cook-off can be initiated simply by chambering a round in a hot firearm, or by firing the first shot with an intentional pull of the trigger, with the rest of the rounds firing because of the heat even if the trigger is released and not pulled again. Thus, if a shooter pulls the trigger once and a cook off then occurs firing more than one round, that too, according to the government, is a machinegun.

That such malfunctions are commonplace can be confirmed with a few online searches, locating discussion threads where shooters tell of their own experiences with firearms of all types malfunctioning and firing more than one round per trigger pull, to the consternation of the shooter, who then worries about legal repercussions.[4] And it is important to note that it happens even in rifles that were designed from the very beginning to be exclusively semiautomatic only, and not just to rifles derived from designs that were originally select fire. For example, the venerable old M1-Garand can and does malfunction and fire more than one shot per trigger pull, even though it was always exclusively a semiauto only design and was bought from the Civilian Marksmanship Program after being reconditioned.[5]

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[4] See http://www.thehighroad.org/archive/index.php/t-114401.html

"was test fireing a AR parts rifle,that I got at a show sat. luckey I use 1rd,2rd,etc method to test with,as rifle double fired at 2rds loaded. with 3rd loaded,it doubles and chambers the 3rd round.

this being my first AR,this was not a happy feeling. what do i need to look at,change out,before the knock on the door?" See also

http://www.thehighroad.org/archive/index.php/t-84754.html

"I have an ORF G1 FAL which I ordered in Feb and received in April. I am happy with the build time. I have not yet worked all the bugs out of the rifle though. Problems: 1. FSE trigger group allowed the hammer to chase the bolt forward occasionally causing the rifle to double. I fixed this problem by putting a DSA fire control group in my rifle ($60).

[5] See:

http://www.odcmp.org/new_forum/topic.asp?TOPIC_ID=75333&SearchTerms=doubling

"I carefully greased all the wear points in the action, op rod, bolt

C. Semi-auto Rifles Based on Military Design Are More Susceptible to Malfunctions That Can Cause More Than One Round to Fire Per Trigger Pull.

1. Free floating firing Pins Increase the Risk of Malfunction Causing More than One Shot to Fire With Only One Pull of the Trigger.

Military primers are harder - the hardest primers - because military firing pins are free-floating rather than being spring retained. When a military firearm is fired, the firing pin stays forward within the bolt as the bolt travels to the rear, ejecting the spent case, and the firing pin does not reset into its rearward, ready to fire position until it impacts the primer on the next unfired round, which the bolt strips out of the magazine and chambers as the bolt returns forward. The firing pin is physically pushed back by the primer as the round is chambered. If one were to pull back the bolt handle and eject that round without firing it, there would be a visible impact dent on the primer, known as a light firing pin strike, from the firing pin hitting the primer as the round is chambered. (See the photo of the two cases, one with the light firing pin

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and even including the sear (perhaps this was my mistake). I went to the Range today, loaded a 2-round enbloc, and proceeded to "safely" fire it down range on a bench from an arms length. Both rounds fired almost instaneously and "ping" the enbloc ejected. At the least, I was taken back, scared and quite cautious. I have other M1's and never had this occur."

strike, in the American Rifleman article, note 1). That design has been used in military firearms, and also their civilian derivatives and counterparts, for many decades, such as with the M1-Garand, designed in the 1930s. The rifle at issue in this case, like dozens of other models on the market, uses a free-floating firing pin.

When the proper ammunition is used, using harder, military specification primers, this is not an issue, as the rifle will not fire even with that light primer strike. The alternative to a free-floating design is to use a spring, but military designs do not use a spring since that would add one more part susceptible to breakage or clogging with dirt, and thus less reliable.

With free-floating firing pins, even if all the mechanical parts of the rifle are in perfect operating condition and well maintained, and the rifle cycles normally, if the ammunition used has a light primer, it can possibly cause the same malfunction as all of the above, with the first and only trigger pull setting off a chain reaction of all of the light primer rounds firing one after another, uncontrollably, even if the shooter releases the trigger. And that is why some shooters of AR-15 type rifles will replace the original firing pin with a titanium version which is lighter and thus has less mass, reducing the impact on the primer and therefor reducing the risk of this malfunction.[6]

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[6] http://www.fulton-armory.com/QM1.htm

2. The Use of Some M-16 Parts in Commercial Semiautomatic Rifles Increases the Risk of Malfunction Leading to More Than One Round Being Discharged Per Trigger Pull

Since as early as 1983, it was widely known by the firearms manufacturers, wholesalers, and dealers that when a rifle has certain M-16 internal parts, while such was not ipso facto illegal, it did make a malfunction leading to multiple shots per trigger pull more likely even when an automatic sear is not present. See the 1983 warning letter to SGW/Olympic Arms from William T. Drake, Assistant Director, Regulatory Enforcement, BATF, which was submitted to the court below as Exhibit 14.[7]

Then, in 1986, Stephen E. Higgins, Director of the BATF, sent out an "Open Letter to Licensees and Others Concerned" warning of "possible Gun Control Act violations in which you could inadvertently become involved."[8] The letter warned that "many of these rifles [patterned after military rifles] using less than the five M16 parts listed above [M16 bolt carrier, hammer, trigger, disconnector, and selector] also will shoot automatically by manipulation of the selector" which is precisely what happened with Olofson's rifle.

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[7] Available online at http://www.mtssa.org/olofson/treasury.html

[8] http://www.mtssa.org/olofson/BATF.html

That same letter also stated that "these rifles may pose a safety hazard in that they may fire automatically without the user being aware that the weapon will fire more than one shot with a single pull of the trigger." *Id.* And yet, the rifle that Olofson owned came from the SGW/Olympic Arms factory with those parts, making it possible to place the selector in between safe and fire, and thus cause a hammer follow through malfunction, which is precisely the malfunction at issue in this case.

Regardless of the cause, with the government's interpretation of what is full-auto meaning merely discharging more than one round per trigger pull, regardless of the cause(s), every owner of a semi-automatic firearm, be it a lowly child's .22 rifle, a hunting or skeet shotgun, a hunting rifle, or a semi-automatic rifle patterned after a military rifle, such as in this case, is vulnerable to having his or her firearm fire more than one shot due to any of the above noted variables at any time. This can happen even when the owner takes all possible precautions, since breakage or ammunition failure can occur at any time. Thus, under the government's interpretation of "full auto" all owners of semi-auto firearms are at risk of being transformed into "instant felons" if the firearm malfunctions or if the ammunition is faulty. This risk is present every time the trigger is pulled and every time the firearm is chambered.

D. Malfunctions That Cause More Than One Round To Fire Can Also Occur With Old Double Barrel Shotguns, Thus Making Them "Machineguns" Under the Government's Wildly Expanded Definition.

A firearm does not have to even be semiautomatic in design or function to have a malfunction occur which causes more than one shot to be fired with only one trigger pull. For example, a double barrel shotgun, a design dating back to the 1800's, when it was used to hunt on the frontier and to guard stage coaches, can have a malfunction causing both barrels to discharge with one trigger pull, and thus meets the government's definition of a "machinegun" since the malfunctioning double barrel shotgun has fired more than one round with only one trigger pull. As with the above malfunctions, this can be caused by wear, such as a worn spring or sear, improper maintenance, corrosion, dirt, etc. That, according to the government's definition, an old, worn out, or dirty double barrel shotgun that malfunctions is a"machinegun" serves to illustrate how untenable and problematic it is to allow the government to abandon the *Staples* standard and adopt a non-standard that permits such an absurdity.

E. Even a Single Action Revolver Can Malfunction and Fire Two or More Rounds With Only One Trigger Pull, Thus Becoming A Machinegun Under the Government's Absurd Standard

In addition, an old single action revolver, a design dating back to the Old West, can also malfunction and fire more than one round per trigger pull, and could even fire all six chambers with one trigger pull. This can happen if the ammunition used has primers that are too thin, such that the firing pin, which is on the hammer on single actions, pierces the primer, causing propellant gases from the discharge to blow back out of the hole in the primer at the rear of the case, propelling the hammer back, which then comes back forward as the cylinder automatically turns, bringing the next cartridge in line to be fired, and once again, the firing pin on the hammer pierces the too-thin primer on the next case, and again propellant gases blow back out of the hole in the primer, propelling the hammer back, and this will continue on through all of the rounds in the revolver's cylinder for as long as the trigger is depressed, just like a kid fanning the hammer on a cap gun in imitation of an Old West gunfighter. This differs from the malfunctions listed above since the shooter can stop it by releasing the trigger, but it still allows for more than one shot per trigger pull. Old West trick shooters did this intentionally by using thin primers. It can also be done by sharpening the firing pin.

Further, this can happen even with older revolvers, such as those used prior to the Civil War, which required individual percussion caps to be installed on nipples for each chamber in the revolver cylinder. Igniting powder in one chamber could be blown into others causing double fire or a chain fire, where all cylinders ignite uncontrollably, and all with only one pull of the trigger.

Such malfunctions can occur even with newly manufactured versions of old designs, that are not considered to be firearms under current legal definitions. For example with a newly manufactured Ruger Old Army cap and ball pistol, if you use the wrong size percussion cap, such as a #12 cap rather than the #10 cap it is designed to use, it will almost certainly double fire or chain fire, discharging two or more rounds with one pull of the trigger, because the cap that is struck is too loose, allowing a space for the fire to get by and into the other chambers.

To take the absurdity of the government's position to its logical conclusion, consider the Snaphunce revolver, designed in the late 17th Century, which where especially prone to chain fires.[9] Thus, according to the government's argument, you could have a weapon that was manufactured in the 17th Century, a full two hundred year before the real machinegun was invented, which would nonetheless be a "machinegun" just because it malfunctioned, if it were considered a firearm at all under the law.

It is only because such ancient weapons are not considered to be firearms under current law that the government is saved from the completely absurd spectacle of a 17th Century artifact being transformed into a "machine gun" because it malfunctions. The government is certainly not saved from that embarrassment by having a standard that is connected

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[9] http://guns.wikia.com/wiki/Revolver

to any common sense definition of what is actually a machinegun.

As those ancient weapons show, there is already a very grey area in the law regarding what is and is not even a firearm, with the law making some rather arbitrary determinations based on dates of manufacture and obsolescence of technology.[10] The government's nebulous definition of what is fully automatic and what is a machinegun only makes the legal landscape all the more murky and uncertain.

Perhaps most perverse is the fact that if a gun owner has a firearm that malfunctions because of wear, fouling, broken parts, or for any of the reasons shown above, there is no remedy or safe harbor. There is no way the owner may divest himself of the firearm for repair or even disposal without being susceptible to prosecution for having illegally transferred a "machine gun." Nor is there a clear mechanism for the gun owner to be sure his firearm is no longer a "machinegun" after he has cleaned, repaired, or adjusted the firearm, or had that service done by a gunsmith. changed ammo to cure the problem. For example, a Korean War era veteran could be out shooting his cherished 1950's era M1-Garand, have a double, where two rounds fire with one trigger pull. If that shooter then corrects the problem, and then gives the rifle to his son or grandson, and it happens again, can he be prosecuted? He "knew" it was a

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[10]http://firearmscoalition.org/new/index.php?option=com_content&task=view&id=403&Itemid=1

"machinegun" according to the government's standard. If it happens again, or if it can be made to happen again, such as by the use of soft primer ammunition, he would be as vulnerable to prosecution as Olofson was. Regardless of how conscientious the shooter, if someone else gains even temporary possession and reinserts the right variable, such as incorrect ammunition (or manipulation of the selector switch as in this case), the malfunction could happen again, thus triggering a prosecution for transfer of a machinegun. In addition, a possession charge is also a possibility at any point for whoever knowingly "possesses" the "machinegun," whether it is the original shooter or the person who later possesses the firearm if warned of the possible danger. Once warned by the transferor, the transferee is now "knowingly" in possession - but of what? A gun that malfunctions once in a while or a machinegun? Only the government can say for sure. Further, at any stage, there is no guarantee that if the gun owner contacts the police or the BATF immediately upon discovery of the malfunction/"machinegun" that a prosecution will not follow. The government may argue that it would not prosecute an "innocent" owner, transferor, or purchaser, but if it will prosecute Olofson, who won't it prosecute? People should not have to rely on the kindness, sense of justice, or common sense of government agents to keep themselves out of prison.

This Court should grant the Petition so that it can return the lower courts to the clear, common sense, practical, and rights supporting standard of *Staples*.

CONCLUSION

In granting certiorari in this case, this Court could, and should, simultaneously place the lower federal courts under the constraint of precedent, and reaffirm the clear and practical *Staples* standard that will avoid absurdity and injustice. For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

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